

**United States Department of Labor
Employees' Compensation Appeals Board**

M.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rochester, NH, Employer**

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**Docket No. 17-0081
Issued: April 20, 2017**

Appearances:

Bradley M. Lown, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 17, 2016 appellant, through counsel, filed a timely appeal from August 5 and September 20, 2016 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 22, 2016 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On appeal counsel argues that the evidence contained in the police report is sufficient to establish that the employment incident occurred as alleged.

FACTUAL HISTORY

On February 2, 2016 appellant, then a 65-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 2016 her supervisor grabbed her left arm in the presence of customers at the front window counter. She alleged that she sustained left shoulder blade pain and stress as a result of this incident. The employing establishment portion of the Form CA-1 indicated that appellant's claim did not match witness statements.

Appellant's supervisor, L.S., completed a statement alleging that on January 15, 2016 appellant called a customer to her station. He informed the customer that appellant could not help her and L.S. instructed appellant to follow her.³ L.S. instructed appellant to come with her to the office. Appellant ignored her. L.S. noted, "At this point I touched her arm to gain her attention. She threw her arm in the air and started shouting 'Don't touch me ... she grabbed me.'" L.S. informed appellant that she had not grabbed her, she touched her, and that she needed to come to her office now. Appellant then followed L.S. to her office where L.S. informed her that she had arranged new bids for a passport clerk. Appellant informed L.S. that she felt disrespected and would not talk to L.S.

In a statement dated January 15, 2016, K.L., a coworker, described appellant walking away as L.S. asked for further conversation. She noted that L.S. placed her hand on appellant's arm and asked her to have a conversation. Appellant threw her arm back and instructed L.S. not to touch her. She walked away with L.S., but shortly returned to close her cash drawer. Appellant's customer suggested that appellant call the police. The customer then called the police and appellant made the report. Appellant waited in the lobby with the customer, perhaps a friend, for the police to arrive.

A second coworker, K.M., also completed a statement on that date. She reported that L.S. had instructed appellant that they had not finished their conversation three times, before L.S. walked to appellant's station, told the customer that appellant could not help her, placed her hand on appellant's arm, and told appellant that she needed to come with her. Appellant threw her arm in the air and told L.S. not to touch her. She then followed L.S. While appellant was gone, the customer, who seemed to know appellant, became agitated asserting that L.S. had grabbed appellant, that she knew people in the union, and that L.S. should be fired. When appellant returned, the customer continued to assert that L.S. had dragged appellant away, that appellant needed to call the union, that appellant needed to file a police report, and that she needed to telephone the police immediately. The customer called the police and appellant reported the incident.

³ L.S. informed appellant that she was not qualified to handle passport applications.

The employing establishment inspector provided an investigative memorandum which detailed L.S.'s statement and noted that the police interviewed all parties. A coworker witnessed the events and completed a statement regarding light contact by L.S. The employing establishment noted that there was a history of a strained relationship between L.S. and appellant. The employing establishment inspector concluded that there was not enough evidence to support a charge as the validity of the alleged assault was questionable and appeared to have been incidental contact to gain the attention of the alleged victim.

The investigative report included a witness statement from appellant's customer that appellant was grabbed by her supervisor. The customer indicated that L.S. grabbed appellant by her arm and dragged her away from the counter. Appellant indicated that she had walked away from L.S. to help customers and that L.S. grabbed her left upper arm. The officer did not observe any marks or signs of injury. L.S. explained that she had not grabbed appellant, but placed her hand on her arm and told her to report to the office. Appellant began screaming that L.S. had grabbed her. A coworker, K.L., confirmed that L.S. put her hand on appellant's arm, rather than pulling or dragging her. Coworker K.M., also stated, that L.S. did not grab or drag appellant. The witnesses noted that the customer, rather than appellant, had called the police and that appellant and the customer had a personal relationship.

In support of her claim, appellant submitted January 19 and 21, 2016 notes from Dr. Richard Capella, an osteopath, indicating that a coworker grabbed and pulled on appellant's left arm. Dr. Capella diagnosed left shoulder acute sprain, anxiety, stress, and panic. Appellant sought treatment for left shoulder pain on February 9, 2016 from Dr. Peter D. Buckley, a Board-certified orthopedic surgeon. Dr. Buckley reported that appellant sustained a left shoulder injury on January 15, 2016 and noted that she had a history of right rotator cuff tear and surgery, but no previous left shoulder issues. He diagnosed left shoulder joint pain possibly stemming from cervical radiculitis and localized primary osteoarthritis of the left shoulder acromioclavicular joint. He described the employment incident as a coworker pulling appellant's arm and opined that the injury was work related. Dr. Buckley indicated that appellant could return to work with restrictions.

On February 25, 2016 OWCP requested additional factual and medical evidence from appellant to support her claim. It noted discrepancies in the description of the employment incident, as well as the medical evidence. OWCP provided appellant with a questionnaire and afforded her 30 days to respond.

In a February 17, 2016 note, Dr. Reiko Johnson, a Board-certified family practitioner, diagnosed stress and anxiety related to an incident at work involving a coworker.

Appellant completed a statement on March 4, 2016 and described the events of January 15, 2016. She noted that she was working and attempted to ascertain when her eligibility for processing passport applications expired. Appellant attempted to explain to L.S., but she became loud. She returned to her window and told L.S. "it's okay." L.S. followed appellant to her window and instructed the customer that appellant would not be helping her. She then grabbed appellant's left forearm and pulled her. Appellant was in shock, but followed L.S. to the office where she yelled at her. She alleged that L.S. publically humiliated her and that two customers offered sympathy.

By decision dated March 22, 2016, OWCP denied appellant's traumatic injury claim finding that the evidence of record failed to support that the alleged events took place as she described. It noted that the statements of appellant's coworkers did not corroborate her version of events. OWCP further noted that the police report noted that no injuries were visible and that witnesses interviewed offered varying descriptions of events.

Dr. Johnson released appellant to return to fully duty on March 2, 2016. On March 8 and April 5, 2016 Dr. Buckley diagnosed left shoulder joint pain consistent with rhomboid strain. He released appellant to return to work with restrictions. In a May 16, 2016 report, Dr. Buckley diagnosed rhomboid and scapular rotator strain. He opined that this condition was related to the incident when she was pulled by her supervisor.

Appellant submitted a statement dated June 28, 2016 and alleged that her supervisor grabbed her arm. She asserted that the witness statements meant nothing.

Counsel requested reconsideration on July 21, 2016 and submitted a note from Dr. Buckley. In a report dated May 16, 2016, Dr. Buckley diagnosed rhomboid and scapular rotator strain. He opined that this condition was related to the incident when she was pulled by her supervisor.

By decision dated August 5, 2016, OWCP denied appellant's request for reconsideration of the merits, noting that her claim was denied due to the finding that she failed to establish that the employment incident occurred as alleged. It determined that the additional medical evidence submitted was irrelevant to the denial of appellant's claim.

Counsel requested reconsideration on August 22, 2016 and submitted additional medical evidence. He argued that corroborating evidence confirmed that the employment incident occurred, but that the extent of physical contact was at issue. Counsel opined that there was corroborating evidence of the physical wrenching that occurred at work. He also asserted that the failure of the police to make a finding was irrelevant.

On August 8, 2016 Dr. Buckley diagnosed partial thickness rotator cuff tear in the left shoulder.

By decision dated September 20, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that counsel's argument was cumulative and contained no new factual evidence to support appellant's allegation that L.S. grabbed and pulled her arm.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁴ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration

⁴ 5 U.S.C. §§ 8101-8193, 8128(a).

which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁶ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim on August 5 and September 20, 2016.

In support of the initial request for reconsideration dated July 21, 2016, counsel submitted a note from Dr. Buckley. This medical evidence is not relevant to the basis for which OWCP denied appellant's claim, the failure to establish that the employment incident occurred as alleged. As appellant failed to submit relevant new evidence in support of her request for reconsideration, the Board finds that OWCP properly denied reconsideration of the merits in the August 5, 2016 decision.

Counsel again requested reconsideration on August 16, 2016. He argued that appellant had established that the incident occurred as alleged as witness statements supported that L.S. grabbed and pulled her by the arm. The Board finds that this assertion by counsel is insufficient to require OWCP to reopen appellant's claim for consideration of the merits. OWCP reviewed the witness statements prior to issuing the March 22, 2016 merit decision. Counsel's disagreement with OWCP's assessment of the factual evidence does not show that OWCP erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by OWCP. As appellant's requests for reconsideration do not comply with the requirements of section 20 C.F.R. § 10.606(b)(3) of OWCP's regulations, the Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

On appeal counsel argues that the evidence contained in the police report establishes that the employment incident occurred as alleged. However, as explained, the Board lacks jurisdiction over the merits of this case.

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608.

⁷ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 20 and August 5, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 20, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board